No. 92-794

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COMMONWEALTH OF MASSACHUSETTS, et al.,
Petitioners,

v.

GREENWOOD TRUST COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT GREENWOOD TRUST COMPANY

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QUESTION PRESENTED

Whether a late charge which a federally insured state bank imposes when a credit cardholder fails to make timely payment of a minimum monthly installment of an outstanding balance constitutes "interest" within the meaning of Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. §1831d, the federal usury statute applicable to such banks.

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RULE 29.1 STATEMENT

Respondent Greenwood Trust Company is a wholly-owned subsidiary of Sears Consumer Financial Corporation, a wholly-owned subsidiary of Dean Witter Financial Services Group Inc. Dean Witter Financial Services Group Inc. is a wholly-owned subsidiary of Sears, Roebuck and Co.

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BRIEF IN OPPOSITION OF RESPONDENT GREENWOOD TRUST COMPANY

PRINCIPAL STATUTORY PROVISIONS INVOLVED

Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, codified as Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d(a), provides in pertinent part:

> In order to prevent discrimination against State-chartered insured depository institutions, . . . such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest . . . at the rate allowed by the laws of the State, territory, or district where the bank is located. . . .

Section 85 of the National Bank Act, 12 U.S.C. §85, provides in pertinent part:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located. . . .

Del. Code Ann., Tit. 5, §950, provides in pertinent part:

> If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge upon any outstanding unpaid installment payments or portions thereof under the plan which are in default. . . .

STATEMENT

Respondent Greenwood Trust Company ("Greenwood") is a federally insured bank chartered by the State of Delaware. It issues its "Discover Card" to cardmembers throughout the country, including cardmembers residing in Massachusetts. While Greenwood does not impose on Discover Cardmembers an annual fee (or various other fees typical in the credit card industry), it does charge a $10 fee if a cardmember fails to make his or her minimum monthly payment of an outstanding balance within 20 days after the due date (*i.e.*, within 45 days after the billing date). This fee is clearly and conspicuously disclosed to prospective cardmembers with the application for a Discover Card and is set forth in the Discover Cardmember Agreement.

Greenwood imposes its late charge on an interstate basis in reliance upon Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), codified as Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d(a), which authorizes a federally insured state bank such as Greenwood to charge "interest" on its loans at "the rate allowed by the laws of the State . . . where the bank is located." Greenwood is located in Delaware, whose laws authorize the late charge at issue. Del. Code Ann., Title 5, §950. Section 521 of DIDA applies "notwithstanding any State constitution or statute which is hereby preempted . . . ."

The Commonwealth of Massachusetts and its Attorney General (the "Commonwealth") have asserted that a Massachusetts statute prohibits Greenwood from imposing a late charge on Massachusetts cardmembers. However, the First Circuit Court of Appeals reversed a decision of the district court in favor of the Commonwealth. The First Circuit unanimously held that Greenwood's late charge is "interest" under Section 521 and that the Massachusetts statute is therefore overridden by Section 521's express preemption provision.

Section 521, the federal usury statute applicable to federally insured state banks, has its genesis in Section 85 of the National Bank Act, 12 U.S.C. §85, the federal usury statute applicable to national banks. Since 1864, Section 85 has authorized national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located . . . ."

In the 116 years between the enactment of Section 85 in 1864 and the enactment of Section 521 in 1980, this Court, the courts of appeals and other courts have interpreted Section 85 on numerous occasions. In 1874, in *Tiffany v. Nat'l Bank of Missouri,* 85 U.S. (18 Wall.) 409 (1874), this Court articulated the "most favored lender" policy embedded in Section 85. That policy provides that a national bank may impose the interest charges available to the "most favored lender" under the law of the bank's home state. It is designed to protect national banks against the possibility of state legislation favoring other lenders over national banks. Following *Tiffany,* this Court and other courts have uniformly concluded that Section 85 incorporates the entire usury law applicable to the "most favored lender" in the state where a national bank is located and that a wide variety of loan-related charges constitute "interest" under Section 85. In 1978, in *Marquette Nat'l Bank v. First of Omaha Service Corp.,* 439 U.S. 299 (1978), this Court unanimously held that Section 85 empowers a national bank to export the interest charges permitted by the laws of its home state to credit card customers residing in another state, regardless of more restrictive usury laws of the other state.

Just two years after *Marquette,* Congress enacted Sections 521-523 of DIDA.[1] Using language taken virtually verbatim from Section 85, Section 521 authorizes federally insured state banks to charge interest "at the rate allowed by the laws of the State . . . where the bank is located . . . ." The preamble of Section 521 states that Section 521 is enacted "to prevent discrimination against State-chartered insured depository institutions . . . ," and the legislative history of Sections 521-523 shows that Congress intended to extend the same federal usury authority long exercised by national banks under Section 85 to all other federally insured depository institutions. Thus, the courts and federal banking agencies have uniformly concluded that Sections 521-523 confer on other federally insured depository institutions precisely the same "most favored lender" and exportation rights conferred on national banks by Section 85. In its Petition, the Commonwealth has not contested the First Circuit's conclusion that Sections 85 and 521 should be interpreted *in pari materia.*

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1. Section 522 of DIDA, 12 U.S.C. § 1463(g), dealing with federally insured savings institutions, and Section 523 of DIDA, 12 U.S.C. §1785(g), dealing with

SUMMARY OF ARGUMENT

The First Circuit's decision does not plow any new ground. Instead, it is the latest in a long and unbroken line of decisions that uniformly have held a wide variety of fees and charges to constitute "interest," rejecting the argument, now made by the Commonwealth, that "interest" as used in Section 521 and Section 85 should be construed to encompass only percentage-based periodic interest charges. Neither this Court, any court of appeals nor any state court of last resort ever has construed "interest" in Sections 521-523 of DIDA or Section 85 of the National Bank Act in the manner urged by the Commonwealth, and thus there is no conflict of authority that requires this Court's resolution.

Moreover, the First Circuit's decision accords with the position of the federal banking agencies, each of which holds the view that late charges constitute "interest" for purposes of Sections 521-523 of DIDA and Section 85. Indeed, the Federal Deposit Insurance Corporation (the "FDIC"), which is responsible for administering and enforcing the Federal Deposit Insurance Act, filed an *amicus curiae* brief in the First Circuit asserting that Greenwood's late charge constitutes "interest" under Section 521 and that the district court's holding to the contrary should therefore be reversed.[2] The Office of the Comptroller of the Currency (the "OCC") specifically authorized the FDIC to state in its brief that the OCC concurred with the analysis of Section 85 contained in that brief.

The decision below does not have the practical significance ascribed to it by the Commonwealth. Since 1978, when this Court decided *Marquette,* there has been no question as to the right of national banks to export their percentage-based periodic interest charges under Section 85 to cardholders in other states. State banks have exported such charges since 1980, a practice the Commonwealth concedes is legitimate under Section 521 and *Marquette.* (Pet. 19 and n. 14). State and national banks also have long exported credit card late charges in reliance upon *Marquette*,

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federally insured credit unions, are substantively identical to Section 521 of DIDA.

2. A number of state attorneys general also filed an *amicus curiae* brief in the First Circuit supporting Greenwood.

the uniform case law holding that "interest" in Section 85 encompasses a wide variety of fees and charges and opinion letters from the federal banking agencies advising the industry that Section 85 and Sections 521-523 permit the exportation of late charges.

Nor does the decision below generally interfere with state regulation of consumer lending practices. For example, it has no effect on state laws requiring specified disclosures, prohibiting discrimination, regulating collection practices and governing similar matters. This case does not involve, and the First Circuit did not decide, whether Section 521 extends to attorney's fees, prepayment penalties and like charges.

In short, the First Circuit's opinion merely reaffirms the legitimacy of a well-established banking practice and thus, contrary to the Commonwealth's claim, it will not have a "dramatic impact" on state consumer protection laws. There is no reason for this Court to grant a writ of certiorari in order to decide whether "interest" in Section 521 includes a late charge — an issue that has not created any conflict among the courts and federal banking agencies.

ARGUMENT

A. Courts Have Consistently Held That "Interest" As Used In Section 85 Is Not Restricted To Percentage-Based Periodic Interest Charges.

Congress was not writing on a clean slate when it enacted Section 521 in 1980. Rather, it incorporated into that statute, almost verbatim, the language of Section 85 of the National Bank Act, which was enacted more than a century earlier, in 1864. The preamble to Section 521 states that it was enacted "[i]n order to prevent discrimination against State-chartered insured depository institutions . . . ," and the legislative history of Sections 521-523 demonstrates that Congress intentionally incorporated Section 85's language into those statutes in order to establish a "level playing field" in which all federally insured depository institutions would obtain the same federal usury authority long exercised by national banks under Section 85. (Pet. App. A-29 — A-38). Given this legislative history, the preamble to Section 521 and the virtual identity of language between Section 85 and Section 521, the First Circuit held that those statutes should be construed *in*

pari materia. The Commonwealth does not challenge that determination.

This Court repeatedly has applied the cardinal rule of statutory construction that when Congress borrows the words of one statute to draft another "we can only assume it intended them to have the same meaning that courts had already given them." *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311, 1318 (1992). *Accord Evans v. U.S.*, 112 S.Ct. 1881, 1885 n. 3 (1992) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Thus, the First Circuit held that the incorporation of Section 85's language into Section 521 reflected Congress' intention to adopt the judicial construction which the term "interest" had already received in the many decisions construing Section 85. (Pet. App. A-34 — A-36).

Courts have long recognized the need to construe "interest" in Section 85 to effectuate the "most favored lender" doctrine, which this Court articulated more than a century ago in *Tiffany*, *supra*, and reaffirmed in *Marquette*, *supra*, 439 U.S. at 314 and n. 26. This doctrine provides that Section 85 empowers a national bank (and Sections 521-523 now empower other federally insured depository institutions)[3] to make loans on credit terms as favorable as those allowed to any competing lender located in the same state; it is intended to safeguard federally insured depository institutions from the "hazard of unfriendly legislation by the states." *Tiffany*, *supra*, 85 U.S. at 413.[4] If "interest" under Section 85 and Section 521 were construed to encompass only percentage-based periodic interest charges, as urged by the

3. It has been held repeatedly that the most favored lender doctrine, which was originally applicable only to national banks, now extends to all federally insured depository institutions, since Congress incorporated the language of Section 85 into Sections 521-523 of DIDA in order to create parity among all federally insured depository institutions. *See, e.g., Gavey Properties, supra*, 845 F.2d at 521; *Hill v. Chemical Bank*, 799 F. Supp. 948, 951 (D. Minn. 1992); *Vanderweyst v. First State Bank of Benson*, 425 N.W.2d 803, 805-07 (Minn. 1988), *cert. denied*, 488 U.S. 943 (1988); Interpretive Letter No. 92-47, Letter of Douglas H. Jones, FDIC Deputy General Counsel, (Current) Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992).

4. Relying on this Court's decisions in *Daggs v. Phoenix Nat'l Bank*, 177 U.S. 549, 555 (1900), and *Citizens' Nat'l Bank v. Donnell*, 195 U.S. 369, 374 (1904),

Commonwealth, then a state would be free to enact a statute enabling certain lenders to impose late charges while denying that same right to federally insured depository institutions located in such state. This is precisely the type of "unfriendly legislation" that the most favored lender policy was intended to prevent.

The many cases construing Section 85 before the enactment of Section 521 in 1980 *uniformly* hold that "interest" under Section 85 is *not* restricted to percentage-based periodic interest charges, but also includes a wide array of other fees and charges.[5] *See, e.g., Fisher v. First Nat'l Bank of Omaha*, 548 F.2d 255, 261 (8th Cir. 1977) (credit card cash advance fee); *Northway Lanes v.*

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the Eighth Circuit declared several years before the enactment of Section 521 that "[t]he primary principle of construction of 12 U.S.C. §85 . . . is that the federal Act adopts the entire case law of the state interpreting the state's limitations on usury; *it does not merely incorporate the numerical rate adopted by the state.*" *First Nat'l Bank in Mena v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975) (emphasis added). *Accord Roper v. Consurve, Inc.*, 777 F. Supp. 508, 511 (S.D. Miss. 1990), *aff'd* 932 F.2d 965 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 181 (1991). Similarly, in 1936 the Office of the Comptroller of the Currency adopted an Interpretive Ruling, subsequently codified in 1972 at 12 C.F.R. §7.7310(a), providing that Section 85 incorporates not only the laws of the bank's home state which prescribe percentage-based periodic interest charges, but all of the state's usury laws which are "material to the determination of the interest rate." This Interpretive Ruling has been cited with approval by this Court and numerous courts of appeals. *See, e.g., Marquette, supra*, 439 U.S. at 314 n. 26; *Gavey Properties/762 v. First Financial Savings & Loan Association*, 845 F.2d 519, 521 (5th Cir. 1988); *Fisher v. First Nat'l Bank of Omaha*, 548 F.2d 255, 260 (8th Cir. 1977); *Fisher v. First Nat'l Bank of Chicago*, 538 F.2d 1284, 1288 n. 9 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855, 864 (6th Cir. 1972).

5. In *Marquette*, this Court recognized the economic nexus between percentage-based periodic interest charges and other fees and charges: "To compensate for the reduced interest [prescribed by Minnesota's limit on percentage-based periodic interest rates], Minnesota law permits banks to charge annual fees of up to $15 for the privilege of using a bank credit card. . . ." 439 U.S. at 302-03. Likewise, in creating interest rate "packages," some states compensate for a low ceiling on percentage-based periodic interest rates by allowing lenders to charge specified late fees. If the term "interest" in Sections 521-523 of DIDA and Section 85 were construed not to include late charges, federally insured depository institutions could be rendered "least favored lenders" in interstate transactions, since their home states could restrict them to low ceilings on percentage-based periodic interest rates and the states where their borrowers reside simultaneously could deny them the right to compensate for those low ceilings by imposing late charges permitted by their home states.

Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855, 863-64 (6th Cir. 1972) (closing costs);[6] *McAdoo v. Union Nat'l Bank*, 535 F.2d 1050, 1056 (8th Cir. 1976) (compensating balance requirement); *Panos v. Smith*, 116 F.2d 445 (6th Cir. 1940) (mortgage taxes and recording fees); *Schumacher v. Lawrence*, 108 F.2d 576, 577 (6th Cir. 1940) (same); *Cronkleton v. Hall*, 66 F.2d 384, 387 (8th Cir. 1933), *cert. denied*, 290 U.S. 685 (1933) (bonus or commission); *Landau v. Chase Manhattan Bank*, 367 F. Supp. 992 (S.D.N.Y. 1973) (service and maintenance charges); *Gerber's Estate*, 337 Pa. 108, 9 A.2d 438 (1939) (bank charge in form of broker's commission); *First Nat'l Bank v. Phares*, 174 P. 519 (Okla. 1918) (transaction costs).[7]

In class actions triggered by the now-reversed district court decision in this case, courts specifically have held that credit card late charges constitute "interest" under Section 85 and Section 521. *Tikkanen v. Citibank (South Dakota), N.A.*, 801 F. Supp. 270, 1992 U.S. Dist. LEXIS 13836 (D. Minn. Sept. 10, 1992); *Nelson v. Citibank (South Dakota), N.A.*, 794 F. Supp. 312, 319 (D. Minn. 1992) (characterizing case law as "overwhelming"); *Hill v. Chemical Bank*, 799 F. Supp. 948 (D. Minn. 1992);[8] *Sherman v. Citibank (South Dakota), N.A.*, Superior Court of New Jersey Law Division — Camden County, Docket No. L-01834-92 (Nov. 25, 1992).

In light of the uniform and well-established body of law construing "interest" in Section 85 to encompass an array of fees other than percentage-based periodic interest charges, the Commonwealth concedes, as it must, that courts construing Section 85

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6. The Commonwealth attempts to dismiss *Northway Lanes* by contending (Pet. 28, n. 19) that the court did not decide that closing costs are "interest." However, in addressing the legality of the national bank's imposition of closing costs on the borrower (which were permitted to state savings and loan associations but not banks in the state where the national bank was located), the court held that "[t]he legislative history of Section 85 . . . requires the conclusion that national banks may charge as much *interest* as savings and loan associations are allowed to charge on equivalent transactions by Michigan law." 464 F.2d at 862 (emphasis added).

7. *See, also, American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 787-88 (9th Cir. 1982) (compensating balance requirement); *Kenty v. Bank One, Columbus, N.A.*, 1992 WL 170605 (S.D. Ohio April 23, 1992) (excessive and unauthorized insurance premiums).

8. *Nelson* and *Hill* were decided prior to the First Circuit's ruling below.

have "often broadly interpreted 'interest' to cover a wide variety of charges" and "[t]here is no question that in usury cases courts *must include as interest* some fees and charges associated with loans." (Pet. 27, 29) (emphasis added). (*See also* Pet. at 43 (acknowledging that certain "incidental loan charges" may "fairly be viewed as 'interest'")). These concessions contradict the Commonwealth's assertion (Pet. 30) that the supposed "plain meaning" of "interest" in Sections 521-523 and Section 85 excludes late charges.[9]

The Commonwealth argues (Pet. 26-30) that although some loan-related fees and charges "must" be considered "interest" for usury purposes under Sections 521-523 and Section 85, they somehow lose their status as "interest" when considered in the preemption context under those *same statutes*.[10] While the Commonwealth's proposed distinction between usury cases and preemption cases is somewhat unclear,[11] the Commonwealth seems

9. Delaware and many other states deem late charges to be "interest"; other states take a contrary view. *See* Annotation, 63 A.L.R. 3d 50 (1975). The very existence of these divergent views refutes the Commonwealth's claim that the supposed "plain meaning" of "interest" does not embrace late charges. *Cf. National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) ("The existence of alternative dictionary definitions of the word ... itself indicates that the statute is open to interpretation. Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context."). When Section 521 was enacted, *Black's Law Dictionary* (5th ed. 1979) defined "interest" as "the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." Moreover, about the time Section 85 was enacted, this Court defined "interest" as the "compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention. . . ." *Brown v. Hiatt*, 82 U.S. (15 Wall.) 177, 185 (1873). Late charges clearly fall within these definitions.

10. The Commonwealth fails to acknowledge that the "usury cases" it dismisses as "a completely distinct line of cases" arise under *Section 85*, not state usury statutes. (*See* cases cited at Pet. 27-29, n. 19).

11. The Commonwealth characterizes *Fisher v. First Nat'l Bank of Omaha*, *supra*, as a usury case and not a preemption case. In *Fisher*, a national bank located in Nebraska charged its Missouri credit cardholders a flat cash transaction fee forbidden by Missouri law but authorized under Nebraska law for small loan companies. The Commonwealth states that the *Nebraska* "small loan interest rate was high enough to make the [cash transaction] fee irrelevant." (Pet. at 28, n. 19). However, Section 85's incorporation of the Nebraska small loan statute shows that the fee was "interest." The bank's imposition of this fee on Missouri cardholders involved both *exportation* of Nebraska law and *preemption* of Missouri law.

to argue that the word "interest" in Section 85 and Section 521 has one meaning in one situation and a different meaning when construed in another context. This protean construction is not accompanied by citation to case law or legislative history, and indeed there is nothing in the history of Sections 521-523 or Section 85 suggesting that Congress intended the word "interest" in those statutes to be construed more narrowly in the preemption context than in the usury context. If Greenwood's late charge "must" be treated as "interest" under Section 521 for usury purposes, it must likewise be considered "interest" under Section 521 for preemption purposes. *See* Pet. App. at A-50 — A-51; *Tikkanen, supra,* 1992 U.S. Dist. LEXIS 13836 at *18; *Nelson, supra,* 794 F. Supp. at 320.

The Commonwealth has not cited *any* decision rendered by this Court, another court of appeals or a state court of last resort (or any other court) holding that "interest" in Sections 521-523 of DIDA or Section 85 is limited to percentage-based periodic interest charges. Thus, there is no conflict between the First Circuit's construction of "interest" in Section 521 and that adopted by any other court.[12] Nonetheless, as one of its reasons for granting certiorari, the Commonwealth has attempted to create the appearance of a conflict between the First Circuit's decision and the decisions in three completely inapposite cases: *Nat'l State Bank v. Long,* 630 F.2d 981 (3d Cir. 1980); *North Dakota v. Merchants Nat'l Bank and Trust Co.,* 634 F.2d 368 (8th Cir. 1980) (*en banc*); and *Perdue v. Crocker Nat'l Bank,* 38 Cal.3d 913

12. The First Circuit's construction of the meaning of "interest" accords not only with the views of all other courts but also with those held by the federal banking agencies. The FDIC, which is charged with the responsibility of administering the Federal Deposit Insurance Act (including the provision at issue), filed an *amicus curiae* brief in the First Circuit urging it to hold that Greenwood's late charge constituted "interest" under Section 521, and a recent FDIC staff opinion letter reiterates that position. Interpretive Letter No. 92-47, Letter of Douglas H. Jones, FDIC Deputy General Counsel, (Current) Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992). Also, the OCC and the Federal Home Loan Bank Board have opined that late charges constitute "interest" under Section 85 and Section 522 of DIDA. (Pet. App. A-52 — A-53). The First Circuit noted that its statutory construction found support in the banking agencies' views, but stated that it did not base its decision on deference to these agency views because "we would reach the same result independent of any reliance on them." (Pet. App. A-52 — A-53 and n. 11).

(1985), *appeal dismissed*, 475 U.S. 1001 (1986). (Pet. 37-39). None of these cases involves Section 85 or Sections 521-523 of DIDA, much less considers the meaning of "interest" as used in those statutes.[13] Thus, the supposed "conflict" between these decisions and the decision below is chimerical.[14]

The Commonwealth also contends that the decision below conflicts with cases upholding dual state and federal regulation of national banks. (Pet. 35-37). However, none of these cases involves the scope of preemption under Section 85 or Sections 521-523 of DIDA. Moreover, the Commonwealth's argument ignores the express preemption provision contained in Section 521, added by Congress two years after *Marquette* to ensure that federally insured state banks, savings and loan associations and credit unions would obtain the same interstate exportation powers that *Marquette* held to be possessed by national banks under Section 85. (Pet. App. A-36 — A-37).

In *Marquette*, this Court unanimously held that Section 85 empowers a national bank to export the interest allowed in the state where it is located to any state where a credit card customer resides, regardless of whether the exported interest exceeds the usury ceiling of the cardholder's state. This Court acknowledged that such exportation power might "significantly impair the ability of States to enact effective usury laws," but it nonetheless held

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13. *Long* involved a state prohibition against redlining, *Merchants Nat'l* involved national bank name changes pursuant to Section 30 of the National Bank Act, and *Perdue* involved the general deposit-taking powers of national banks under Section 24 of the National Bank Act. *Long* and *Merchants Nat'l* are so wide of the mark that they were neither mentioned in the district court's opinion nor cited in the Commonwealth's brief in the First Circuit. The district court acknowledged that *Perdue* was "not squarely on point here. . . . " (Pet. App. C-50).

14. The Commonwealth also incorrectly suggests that the First Circuit's decision is inconsistent with *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). (Pet. 40). That case holds that federal law governs the meaning of "branch" for purposes of the McFadden Act, since Congress defined that term in the Act. 12 U.S.C. §36(f). By contrast, Congress did not define "interest" in Section 85 or Section 521, and those statutes explicitly incorporate the laws of the state where the bank is located. In any event, the First Circuit held that late charges constitute "interest" under both federal common law *and* Delaware law, and therefore it did not deem it necessary to resolve whether federal law or state law governed the definitional issue. (Pet. App. A-43 — A-44).

that "state usury laws must, of course, give way to the federal statute." *Id.* at 318-19 n. 31. Requiring banks to comport with the varying usury laws of each state where their credit cardholders reside would "throw into confusion the complex system of modern interstate banking." *Id.* at 312. Forcing credit card issuers to vary their late charge provisions to comply with disparate state laws would engender the very confusion *Marquette* sought to avoid.

Finally, the Commonwealth's contention (Pet. 30-35) that the First Circuit's preemption finding is "inconsistent" with the decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992) is baseless. The First Circuit's opinion is replete with citations to *Cipollone*, and its preemption analysis was entirely faithful to the preemption principles outlined by this Court in that case.[15] The First Circuit correctly held that the express preemption provision of Section 521 and that statute's legislative history showed that Congress' "intent to displace state law is clear." (Pet. App. A-39).[16]

The Commonwealth's argument concerning the incompatibility of the decision below and *Cipollone* rests on a misreading of a

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15. Similarly, the Commonwealth's reliance (Pet. 33-35) upon *Cable Television Ass'n v. Finneran*, 954 F.2d 91 (2d Cir. 1992) is misplaced. There, the court held that the Cable Act's preemption of state laws regulating rates for the "provision" of cable services did not extend to downgrade charges imposed for *removing* such services. The court noted that the Cable Act allows "marketplace forces, rather than Government regulation" to determine rates for the "provision" of cable services, and downgrade charges are not covered by the Act's preemption provision because they create a disincentive to switch cable providers and thus "insulate cable companies from market forces." *Id.* at 100. In the instant case, of course, the Commonwealth is arguing *against* the Congressional determination in DIDA to allow marketplace forces to govern the pricing of credit by banks. As was the case with the Airline Deregulation Act of 1978, considered by this Court in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2034 (1992), it would serve no purpose under Section 521 to "undo federal deregulation" and hamper the functioning of a free and open market for credit services by subjecting federally insured state banks to a myriad of state usury laws rather than the single usury law (applicable to the "most favored lender" in the bank's home state) incorporated by Section 521.

16. *See also* Pet. App. A-54 (Congress' "preemptory mindset" was "clear and unequivocal" and Section 521 expressly preempts state law "with undeniable clarity."); Pet. App. A-19 ("Congress' intent to effect preemption remains clear and manifest. . . . ").

comment by the First Circuit as to the "inconclusive" nature of the text and legislative history of Section 521. This comment pertained not to Congress' preemptory intent, but related solely to the meaning of "interest." Moreover, it only addresses Section 521's text and legislative history and makes no reference to the case law under Section 85. (Pet. App. A-41). To construe the meaning of "interest," the First Circuit analyzed the many pre-DIDA precedents construing the identical language in Section 85. (*See* pp. 6-7, *supra*). That time-honored approach to statutory construction does not conflict in any respect with the teachings of *Cipollone* or any of this Court's other preemption decisions. *See Morales v. Trans World Airlines,* 112 S.Ct. 2031, 2037 (1992) (construing preemptive language in Airline Deregulation Act in same manner as identical language in ERISA); *Ingersoll-Rand Co. v. McLendon,* 498 U.S. 133, 111 S.Ct. 478, 485-486 (1990) (construing preemptive language in §502(a) of ERISA *in pari materia* with §301 of Labor Management Relations Act).

B. The First Circuit's Decision Does Not Have The Practical Significance Claimed By The Commonwealth.

As discussed above, the First Circuit's construction of "interest" in Section 521 simply reaffirms already well-settled law, and therefore its decision does not carry great legal significance. Likewise, that decision has far less practical import than the Commonwealth would have this Court believe.

The Commonwealth has substantially overstated the dollar amount of late charges affected by the decision below.[17] Moreover, although the Commonwealth has suggested that the decision

17. Several of the states which the Commonwealth claims prohibit all late charges on all credit card accounts in fact permit late charges, subject to certain limitations. For example, the Commonwealth contends that N.J. Stat. Ann. §17:16C-50 prohibits late charges but ignores the fact that credit card issuers in New Jersey may assess late charges under a different statute. *See* N.J. Stat. Ann. §17:9A-59.7.A. Moreover, nine of the states which the Commonwealth incorrectly claims limit late charges would permit any late charge by statute. *See* Ariz. Rev. Stat. Ann. §44-1205.C.4; Conn. Gen. Stat. Ann. §42-133c; Fla. Stat. Ann. §658.50(1); Ga. Code Ann. §7-5-4(b); Haw. Rev. Stat. §478-4(b); Md. Com. Law Code Ann. §12-910(a)(2)(i); Nev. Rev. Stat. §97.245.1; S.D. Codified Laws Ann. §51A-12-13(7); and Va. Stat. Ann. §6.1-330.78.A.1. The Commonwealth's mischaracterization of the laws of these states largely stems from its failure to recognize that each of these states has alternative usury provisions to those the Commonwealth has cited in its Petition. Moreover, the Commonwealth

will necessarily be extended to preempt state limitations on attorney's fees, prepayment charges and like fees and charges, the decision simply held that a late charge is "interest" within the preemptive scope of Section 521. This decision says nothing about consumer protection laws requiring specified disclosures, prohibiting discrimination, regulating collection practices and governing similar matters.[18]

The Commonwealth ignores the importance of *Marquette*, the true watershed decision relating to exportation of interest charges. For many years, banks have been exporting percentage-based periodic interest charges, a practice the Commonwealth concedes is lawful under Sections 85 and 521 and *Marquette*. Even if this Court accepted at face value the Commonwealth's figure for late charge revenues affected by the First Circuit decision, there is no question that exported late charge revenues are dwarfed by the percentage-based periodic interest charges banks export.[19] Moreover, the decision below will have little effect on

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has ignored state choice of law rules that could result in application of the substantive law of a bank's home state rather than a borrower's state in many cases. Also, the Commonwealth relies on a magazine article to claim that $858 million in late charges was collected by credit card issuers in 1991 (Pet. 16-17) but fails to note how much of this amount was collected in conformity with the laws of the states where the cardholders reside. Indeed, many of the largest states, including New York, Illinois, Florida and Ohio, would permit the late charge at issue as a matter of state law and California does not prohibit late charges.

18. The Commonwealth's assertion (Pet. 11) that the decision below will spur lenders to file declaratory judgment actions against state law enforcement officers in order to avoid compliance with state consumer protection laws is without foundation. The Commonwealth has not cited *any* such actions brought to date, nor is Greenwood aware of any. Also, the Commonwealth's assertion that statutes prohibiting late charges are necessary to protect the "average consumer" (Pet. 18) is contradicted by its acknowledgment in the First Circuit that defaults triggering late charges are "relatively infrequent." (Comm. Br. at 69 n. 84). The only consumers who would benefit from invalidating Greenwood's late charge are those who default on their obligation to make timely payment of their minimum monthly installment, and their gain necessarily would come at the expense of the vast majority of cardmembers who make their payments on time. *See* Dr. William C. Dunkelberg, "Litigation Concerning Late Charges is Major Threat to Credit Card Business," *Banking Policy Report*, April 6, 1992 (available on LEXIS).

19. According to *The Nilson Report* (November 1991), an industry newsletter, revenues relating to late payments and other defaults constituted less than 5% of revenues from percentage-based periodic interest charges in 1990 and 1991.

the exportation of late charges since banks also have been exporting such charges for many years without challenge. They have done so in reliance upon *Marquette*, the unbroken line of cases holding that "interest" in Section 85 extends to a wide variety of charges and not just percentage-based periodic interest charges and the post-*Marquette* interpretive opinion letters by the federal banking agencies endorsing the exportation of late charges (Pet. App. A-52 — A-53). Thus, the First Circuit's decision most certainly does not herald a significant alteration of "the state/federal balance in banking regulation," as asserted by the Commonwealth. (Pet. 19).[20]

Congress has amended Section 521 twice in the past five years. (P.L. 100-86, §101(g) (2), 101 Stat. 552, 563 (1987); P.L. 101-73, §201(a) (1), 103 Stat. 183, 187 (1989)). It must be presumed that, during this time, Congress was aware of and approved the exportation of late charges by credit card issuers and the judicial and administrative interpretations of "interest" in Section 85 and Sections 521-523. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978). Had Congress intended a more restrictive construction of the word "interest" in those statutes, it could have amended them to narrow their preemptive scope, but it has not done so.

In fact, when Congress re-codified Section 522 of DIDA in 1989, it plainly stated that the preemptive scope of Sections 521-523 of DIDA is *not* confined to percentage-based periodic interest charges, but includes other fees and charges as well:

> [The rate authorized by Section 522 of DIDA] may be employed notwithstanding any State constitution or statute concerning *loan related charges*, which is thus preempted. *The effect of this section is to preserve the current preemption of state usury laws*. H.R. Rep. No. 54 at 343 (101st Cong., 1st Sess., pt. 1) (1989) (emphasis added).

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20. The various class actions against credit card issuers that resulted from the erroneous district court decision in this case do not militate in favor of granting certiorari, as the Commonwealth contends. (Pet. 18 and n. 13). None of those cases has progressed to the appellate level. There is no conflict for this Court to resolve since all of the cases agree that credit card late charges constitute "interest". (*See* pp. 6-7, *supra*). *Cf. Cipollone v. Liggett Group, Inc.*, 479 U.S. 1043

As this Court declared in *Red Lion Broadcasting, supra,* "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." 395 U.S. at 380-81. *Accord Heckler v. Turner,* 470 U.S. 184, 209-11 (1985); *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 846 (1986); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 274-75 (1974).

The Commonwealth's policy arguments concerning the desirability of according primacy to state usury laws should be directed to Congress, not this Court. As this Court held unanimously in *Marquette,* "the protection of state usury laws is an issue of legislative policy, and any plea to alter §85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court." 439 U.S. at 319.

C. The Commonwealth's Reliance On Other Authority Is Misplaced.

The Commonwealth makes several references (Pet. 24, 46) to the legislative history of Section 501 of DIDA. However, Section 501 is plainly inapposite. As the First Circuit concluded (Pet. App. A-49 — A-50 at n. 10), the legislative history of Section 501 is irrelevant because: (a) Section 521 incorporates the language long used in Section 85, while Section 501 contains completely dissimilar language; (b) Section 501 applies to first-lien residential mortgage loans by a wide variety of lenders, while Section 521 applies to any loan by a federally insured state bank; (c) Sections 501 and 521 originated in different bills that had vastly different purposes; (d) Sections 501 and 521 have materially different preemption provisions; (e) Section 501 amended the National Housing Act, while Section 521 amended the Federal Deposit Insurance Act; (f) DIDA was a hodgepodge of diverse and unrelated provisions affecting a wide variety of financial institutions, making it inappropriate to apply the legislative history of one provision to construe the meaning of a different provision; and (g) there is no evidence that Congress intended "interest" to have a single meaning throughout all of Title V of DIDA (Sections

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(1987) and 112 S.Ct. 2608, 2613 and n. 3 (1992) (certiorari initially denied prior to conflict, but later granted when conflict arose).

501-529).[21] Section 501 was enacted more than 100 years after the language at issue in this case was first adopted by Congress in the National Bank Act of 1864, and thus it cannot possibly shed light on the intended meaning of that language.[22]

The First Circuit's decision to base its construction of "interest" in Section 521 on the many pre-DIDA judicial precedents construing the identical language in Section 85, rather than the inapposite legislative history of Section 501, is fully consistent with this Court's precedents. *See, e.g., Barnhill v. Johnson*, 112 S.Ct. 1386, 1391 (1992) (in holding that a date-of-honor rule should apply to check payments to determine when a "transfer" occurs under §547(b) of the Bankruptcy Code, this Court deemed irrelevant the legislative history indicating that a date-of-delivery rule

21. The only term Congress defined for the entirety of Title V of DIDA was "State," which was defined in Section 527 "[f]or purposes of this *title*." 94 Stat. 168 (emphasis added). Section 501(e) of DIDA defined various terms (*other* than "interest"), but explicitly stated that those definitions applied only "[f]or the purpose of this *section*." 94 Stat. 163 (emphasis added). That Congress did not intend the term "interest" as used in Section 501 to have the same meaning throughout Title V of DIDA is further underscored by the fact that several months after DIDA was enacted, Congress amended Section 511 (preempting state usury limits on specified business and agricultural loans) of DIDA by providing that "the term 'interest' includes *any compensation, however denominated*, for a loan." (P.L. 96-399, §324(b)(2), 94 Stat. 1648) (emphasis added). The amendment's sponsor, Senator Proxmire, emphasized that it was simply "a technical clarifying amendment making no substantive changes in the usury preemption provisions." 126 Cong. Rec. S17,738 (1980).

22. The Federal Home Loan Bank Board (now the Office of Thrift Supervision), the agency with interpretive authority under Sections 501 and 522 of DIDA, has recognized that late charges should be treated differently for purposes of Sections 501 and 522. *Compare* 12 C.F.R. §590.3(c) with Letter of Harry W. Quillian, Acting General Counsel of the Federal Home Loan Bank Board (June 27, 1986).

should determine when a "transfer" occurs under §547(c) of the Code); *Dewsnup v. Timm*, 112 S.Ct. 773, 778-79 (1992) (holding that "allowed secured claim" should be given a different meaning in §506(d) of the Bankruptcy Code than in §506(a), since Congress had not been writing "on a clean slate" in enacting §506(d) and there was no evidence it intended to alter the pre-Code practice).[23]

23. The Commonwealth's citation (Pet. 44-46) to the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"), sheds no light on whether late charges are "interest" under Section 521. TILA is a disclosure statute that was not intended to make substantive changes in laws relating to the extension or maintenance of credit. *See* 15 U.S.C. §1610(b); 12 C.F.R. §226.1(b). Also, Sections 521-523 and Section 85 do not employ the TILA terms "annual percentage rate" or "finance charge," and the legislative history of Sections 521-523 makes no reference to TILA. Thus, no court has relied upon TILA to construe the meaning of "interest" in Sections 521-523 or Section 85.

Similarly, the Commonwealth's citation (Pet. 47-48) to a number of general treatises on contracts and damages to support its argument (Pet. 43) that charges "contingent on lateness of payment, not on the making of the loan itself," are not "interest" conflicts with the authority, cited at p. 7, *supra*, holding that late charges are "interest." The argument was expressly rejected by the court in *Tikkanen, supra*, 1992 U.S. Dist. LEXIS 13836 at *19-*23.

CONCLUSION

The Commonwealth has been unable to identify a conflict in the courts implicated by the decision below. It has overstated the practical significance of the decision, which flows inexorably from *Tiffany, Marquette* and cases holding that a wide variety of fees and charges constitute "interest" under Section 85. Finally, it has relied on authority that is irrelevant in determining the meaning of "interest" under Section 521. For all of the foregoing reasons, its Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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